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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 28

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF GREAT NORTHERN RAILWAY COMPANY, ET AL., TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 899

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF GREAT NORTHERN RAILWAY COMPANY, ET AL., TO AFFIRM

Pursuant to Rule 16(1)(c) of the rules of this Court, appellees Great Northern Railway Company, Northern Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, Spokane, Portland and Seattle Railway Company, Pacific Coast R.R. Co. and Great Northern Pacific & Burlington Lines, Inc.,[1] move that the judgment of the District Court be affirmed on the ground that the question presented is so clearly lacking in substance as not to warrant further briefing and oral argument.

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[1] Herein called Great Northern, Northern Pacific, Burlington, SP&S, Pacific Coast, the merged company and, collectively, the applicants. Great Northern and Northern Pacific are sometimes referred to as the Northern Lines. These appellees are also filing a motion to affirm in No. 942, *Brundage, et al.* v. *United States, et al.* (October Term, 1968), which relates to the corporate merger terms.

In the transactions approved by the Interstate Commerce Commission (subject to 34 conditions imposed in the order of approval) Great Northern, Northern Pacific, Burlington and Pacific Coast will be merged into, and the properties of SP&S will be leased to, the merged company.[2]

The Commission found that the unification will result in benefits "to applicants," "to shippers," "to the public" and to "employees" (App. 298-311, 323-328).[3] The Commission analyzed the effect of the "elimination of such competition as now exists between" Great Northern and Northern Pacific (App. 315) and the effect of conditions prescribed for the benefit of competing railroads which "will serve to enhance rail competition" (App. 321, 328-334), and determined that the merger, as so conditioned, provides a means for achieving "overriding benefits to the public through improved transportation" and that "the proposals, with requisite conditions, are entirely consistent with the public interest" (App. 344).

The District Court (Chief Circuit Court Judge Bazelon, Senior Circuit Judge Fahy and Chief District Judge Curran) reviewed "the elaborate decision of the Commission" and devoted "special attention to whether the competitive situation to result from the unification, conditioned as it will be, is inconsistent with the public interest, or, as we believe, is consistent therewith in light of the national transportation policy formulated by Congress" (App. 5-6).

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[2] Great Northern and Northern Pacific for many years have owned, in equal shares, all of the stock of SP&S and more than 97 percent of the stock of Burlington, and Great Northern owns all of the stock of Pacific Coast.

[3] The reports and orders of the Commission and the opinion of the District Court are reproduced in the Appendix to Jurisdictional Statement for the United States (herein referred to as "App.").

The District Court referred to the decisions of this Court including the statement in *Penn-Central Merger Cases*, 389 U.S. 486, 500 (1968), regarding "the need for insistence that, before a rail merger is approved, there must be convincing evidence that it will serve the national interest and that terms are prescribed so that the congressional objective of a rail system serving the public more effectively and efficiently will be carried out" (App. 21-22). The court unanimously concluded that "in giving its approval the Commission was guided by the applicable legal principles and made findings, supported by substantial evidence, requisite to the validity of its action" (App. 5).

QUESTION PRESENTED

The question presented is whether there is substantial evidence to support the Commission's findings and determination that the effects of eliminating such competition as now exists between Great Northern and Northern Pacific are outweighed by "overriding benefits to the public through improved transportation," because of benefits that the merger will bring to shippers, employees, the applicant railroads and the general public and because the prescribed conditions will strengthen competing railroads and create new rail competition in the territory involved.

STATEMENT

Attached as an appendix to this motion is a map that shows the location of the lines of the merging railroads.[4] The map also shows the principal competing transcontinental rail routes including the Union Pacific Railroad Company (Union Pacific), Chicago, Milwaukee, St. Paul and

[4] Pacific Coast R.R. Co., not shown separately, operates only in King County, Washington. Burlington subsidiaries, also not shown, operate a line between Wendover, Wyoming and Galveston, Texas.

Pacific Railroad Company (Milwaukee), Chicago and North Western Railway Company (North Western),[5] Soo Line Railroad Company (Soo Line) with its parent Canadian Pacific Railway Company (Canadian Pacific), Southern Pacific Company (Southern Pacific), The Western Pacific Railroad Company (Western Pacific) and The Atchison, Topeka and Santa Fe Railway Company (Santa Fe). The territory involved in this merger and the rail competition of the relevant roads, some in single-line and some in joint-line service, are reviewed at pages 19 to 24 below.

Also shown on the map are the eleven new gateways that would be opened for the Milwaukee on the merged company's lines, as a condition of the merger, and the areas tributary to those gateways. The findings concerning those gateways, and further important competitive gains for Milwaukee and other railroads, are described at pages 25 to 30 below.

1. *Hearings, Examiner's Report and First Report of Commission.* Studies of unification were made by the railroad managements in the latter half of the 1950's in view of the increased intermodal competition from motor and water carriers and the severe impact of that competition upon the earnings of the applicants (App. 255-256; 298-299).[6] Application for authority to merge was filed under

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[5] As noted in the Jurisdictional Statement at page 11, fn. 7, a Commission hearing examiner has issued a report recommending approval of the proposed Milwaukee-North Western merger. I.C.C. Finance Docket Nos. 24182 *et al.* The Justice Department and the applicants herein have requested conditions to the order of approval but have not opposed the merger.

[6] The sharp downtrend in the applicants' earnings from railway operations in the fifteen-year period 1951-1965, and the applicants' low rate of return (*below* the low average rate of return for all railroads) are described in the Commission's Second Report, approving the merger (App. 298-299; see pp. 9-10 below).

Section 5(2) of the Interstate Commerce Act in February, 1961. Hearings before an Examiner were held on 82 days between October, 1961. and July, 1962, at sixteen cities and towns throughout the applicants' territory. The transcript included more than 15,000 pages, and 243 exhibits were offered.

On August 24, 1964, the Examiner issued his comprehensive Recommended Report.[7] He reviewed the evidence in detail, concluded that the merger would be in the public interest, and recommended approval subject to certain conditions that were considerably less extensive than those which the Commission ultimately imposed.

On March 31, 1966, the Commission issued its initial report (328 I.C.C. 460; App. 61-167; called First Report). By a vote of six to five, it denied the applications. Dissenting opinions were filed by the five minority Commissioners, severely criticizing the majority report and pointing out numerous errors therein (App. 167-211).

The basic elements of the First Report, denying approval of the merger, were summarized at the beginning of the Commission's Second Report:

> "In recommending approval of the proposed unification, the examiner found that numerous benefits would flow by way of savings, efficiencies, economies and improved service, and that, suitably conditioned to protect carrier employees and connecting and competing railroads in the territory, applicants' proposal satisfies the statutory requirements. The Commission found in the *prior report*, however, that the disadvantages of unification, namely, a drastic lessening of competition and adverse effects on carrier employees, outweigh

[7] The Recommended Report, consisting of 456 mimeographed pages plus appendices, is made a part of the Commission's order approving the merger (App. 496) and is cited herein as "Exam. Rep.".

the benefits that might be derived therefrom by applicants and the shipping public, and accordingly, concluded that the proposed transactions would not be consistent with the public interest. The Commission found that there would be substantial hardship inflicted upon carrier employees through loss of jobs; and that with imposition of all of the conditions necessary to protect the traffic of other railroads particularly those for the Milwaukee and North Western, the benefits to be produced would be minimal and might preclude consummation. While no dollar figure could be placed upon the value of intramodal rail competition, the value thereof was found not negligible but worth at least $12.7 to $25.2 million in gross annual savings which would accrue to applicants from the merger." (App. 249-250)

2. *Petition for Reconsideration.* On July 27, 1966, the applicant railroads petitioned the Commission for reconsideration of its First Report. The petition referred, in part, to what the petitioners deemed to be important misunderstandings expressed in that report regarding merger benefits and competitive considerations. It also stated that applicants were now willing to accept extensive conditions that had been proposed by Milwaukee and North Western, and conditions requiring the merged company to make agreements under which the employees would receive guarantees and job assurances for the rest of their working lives. Furthermore, the petition pointed out that the probable savings would greatly exceed the amounts indicated in the First Report, even after deductions due to the merged company's loss of earnings on traffic that would shift from it to Milwaukee and North Western under the conditions for those roads, and deductions due to the attrition conditions for employees.

Numerous shipper, agricultural, livestock and horticultural interests in the Northwest filed replies to applicants' petition for reconsideration to urge approval of the merger

because of the importance of the transportation improvements that will result. A number of parties who previously had opposed the merger changed their position in the light of the proposed conditions (App. 268; see pages 37-38 below). These parties included the United States Department of Agriculture, which is the nation's "largest single shipper of agricultural commodities" (Justice Dept. Brief below, p. 85), the Public Utility Commissioner of Oregon, North Dakota and South Dakota, among others, who called attention to the public benefits and to the vigorous rail competition that would follow a suitably conditioned merger. A number of other states or state regulatory agencies, and the shipping and producing public, had supported the merger from the outset (App. 268, 320).

In October, 1966, agreements were made between the applicants and Milwaukee and North Western, detailing terms of the conditions previously proposed by those roads which applicants, in their petition, had offered to accept (Exs. 250, 251). Those roads expressed support for the merger as so conditioned.[8]

3. *Further Hearings and Report Approving Merger.* On January 4, 1967, the Commission reopened the proceeding "for reconsideration, for oral argument, and for further

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[8] Neither Milwaukee nor North Western had opposed the merger if their requested conditions were imposed (App. 100, 107; Tr. 6240, 8325). In the agreements it was specified that each applicant could propose protective conditions in the pending Milwaukee-North Western merger proceeding; such proposals would be withdrawn on consummation of applicants' own merger. The Justice Department errs in saying that under the agreements, the Northern Lines "would seek only standard protective conditions in that [Milwaukee-North Western] proceeding" (J.S. 11). Great Northern and Northern Pacific have urged extensive conditions in that proceeding although the examiner has recommended rejection of those conditions. (Recommended Report, pp. 216-221, I.C.C. Finance Docket Nos. 24182 *et al.*)

hearing; the further hearing to be limited solely to determining, on the basis of the most current information readily available, the amount of estimated savings resulting from the proposed merger in the light of (1) agreements entered into between the applicants, on the one hand, and, on the other, the Milwaukee and the North Western and (2) the effect of relevant financial, operational and other changes related to savings, which have occurred subsequent to the close of hearings; . . ."

The further hearings were held before an Examiner in March and May, 1967. After briefs and oral argument on all issues, the Commission issued its report and order on reconsideration, dated November 30, 1967 (331 I.C.C. 228; App. 245-462; called Second Report). By a vote of eight to two (a recently appointed Commissioner not voting), the Commission approved the merger subject to 34 extensive conditions set out in Appendix L to the report (App. 438-456).[9]

In this Second Report the Commission first reviewed the evidence regarding the amount of the net annual savings from merger (App. 257-266, 299-302). It found that the updated estimates ($39,673,000 after a deduction of $2,015,000 for "contingencies" that may or may not occur (App. 259; Ex. 244, p. 32)) are "a reasonably accurate portrayal of the savings attributable to the proposed unification" (App. 301).[10] In the First Report the Commission had found the savings to be only "between $12.7 and $25.5 million" (App. 165).

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[9] Three Commissioners who were with the majority in the First Report voted, on reconsideration, to approve the merger subject to the conditions.

[10] Full unification requires a 5-year period (App. 262, 263). The savings "will begin to be realized almost immediately after merger but . . . the full amount will probably not be realized until approximately five years after the date of the merger" (Ex. 244, p. 2).

The Commission described the relevant statutory criteria under the decisions of this Court, including particularly the problem of accommodation of Section 5(2) of the Interstate Commerce Act and the antitrust legislation in the light of the objectives of the national transportation policy (App. 273-278). It emphasized that there is no presumption in favor of approval of a particular merger proposal: "the public interest scale is at balance, weighted neither for nor against merger in a particular case. Solely by the evidence bearing upon public interest can the balance be tipped" (App. 276).

Although the Commission stated that each of the major applicants "is currently in a relatively healthy financial condition" (App. 279), it also found that "Applicants are faced with growing intermodal competition" and "an inability to prevent traffic erosion" (App. 298). In this connection the Commission noted the severe downtrend in the applicants' pretax railway earnings over the fifteen-year period 1951-1965 (App. 298-299). That important fact had been ignored in the First Report and is ignored by the Justice Department in the Jurisdictional Statement. The Commission found that the combined average net railway operating income of Great Northern, Northern Pacific and SP&S (before federal income taxes) during the fifteen years was as follows:

5-Year Periods	Annual Average
1951-1955	$74 million
1956-1960	59 million
1961-1965	48 million

"The combined average, for all of the applicants [including Burlington], fell from $121.6 million during 1951-1955 to $86.9 million during 1956-1960, and to $73.9 million during 1961-1965" (App. 299). The combined annual average for

all applicants thus was $47.7 million less in 1961-1965 than it had been in 1951-1955. Even with the $40 million of annual merger savings, the earnings would still fall short of the earnings level of 1951-1955. And the intermodal highway and waterway competition is increasing (App. 298, 310, 344).[11]

The Commission noted that one of the benefits of merger would be to enhance the low rate of return. In 1965 and 1966 the applicants' average rate of return (3.33 and 3.7 percent) was "less than the yield on nonrisk Government bonds" and was below the unfortunately low average rate of return for all Class I railroads (App. 299). "Low rates of return, if continued, may well pose serious obstacles in attracting necessary investment capital, and affect reinvestment decisions by the rails as well" (App. 299, 304-305).

The Commission then described in detail the benefits to shippers that would result from the suitably conditioned merger (App. 305-311). The Commission made specific findings relating to the faster and more dependable freight schedules and services which are "extremely important here" (App. 305-308); the benefits of the "additional routes"—with attendant loading, unloading and consignment privileges—that will enable shippers to reach new markets and sources of supply (App. 308); the great improvement and increase in car supply in terms of service

[11] The Commission's findings include the following: "Advances made over the years by other transport modes in the areas served by applicants make it imperative for the railroads to increase their competitive capability. Illustrative of these advances are plans to develop further waterways for increased barge navigation, and the completion of Interstate Highways 90-94, which will allow a reduction in truck transit time from 60 to 36 hours between the Twin Cities and Seattle." (App. 310)

and estimated car days and miles saved (App. 309); the reduction in rates resulting from the new availability of joint-line rather than the higher combination rates (App. 309-310); the switching charge reductions resulting from elimination of the prevailing dual or non-competitive switching charge levels (App. 310); benefits to shippers in saving clerical and other time (App. 308-309, 310); benefits arising from the overall reduction in rail transportation costs (App. 305-306) and increased competition with other modes (App. 310); the effects of constructing new consolidated yards and physical improvements that will reduce traffic congestion both on the rails and in the streets (App. 306-307, 310); and the increased capacity to serve the national defense (App. 311). The Commission also made findings with respect to the beneficial effects of the Milwaukee and North Western conditions in multiplying the additional routes and markets opened by merger (App. 308); in extending Milwaukee service to permit it to reach Portland, Oregon and Billings, Montana and to become a transcontinental ratemaker (App. 307, 311); and in providing Milwaukee with trackage rights to establish, with Southern Pacific, a competitive rail route between California and Canada via Portland (App. 311).

The Commission reviewed the attrition agreements that had been made with certain employees and imposed conditions that extended to employees (beyond the employees subject to those agreements) life-time job and monetary guarantees (App. 323-328). The Commission made it clear that the conditions removed the "hardship on employees" which had been an important factor in the conclusion reached by the majority Commissioners in the First Report (App. 328). It found that such employee benefits could hardly be achieved except for this merger (App. 326) and

they will have, as the Commission later added, "salutary effects" upon employees and local communities (App. 468).[12]

The Commission carefully considered the competitive effects of the merger. Its findings on this aspect of the transaction are discussed in detail at pages 19 to 30 below. As that discussion shows, the Commission specifically considered the competitive situation in the four-state Northern Tier and did not rest its findings or conclusions simply on an analysis of the situation systemwide. (Pp. 20-22 below.) That discussion also shows that the Commission gave appropriate attention to the number of common points served by the Great Northern and Northern Pacific and to the tonnage and revenues generated at those points. The Commission, however, did not rest its findings or conclusions solely on this statistical analysis, or on the existence of intermodal competition. It took into account other circumstances, fully supported by substantial evidence, that were relevant and persuasive in any realistic appraisal of the extent of the competition between the two lines.

The Commission made specific findings on the effects of the conditions prescribed for the benefit of the Milwaukee and the North Western, supporting its conclusion that those conditions will create extensive new competition and

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[12] Counsel for Railway Labor Executives' Association, comprising the labor organizations representing virtually all of applicants' employees, appeared specially at the hearing on preliminary injunction in the District Court to call the court's attention to the fact "that the benefits to the employees secured under these agreements—and they are substantial—will not be realized unless and until the merger is consummated." (Transcript of May 15, 1968, p. 92.) Affidavits of G. E. Leighty, Chairman of RLEA, and C. L. Dennis, International President of the Brotherhood of Railway and Airline Clerks, were filed with this Court on May 14, 1968 as attachments to the Supplemental Memorandum of Railroad Respondents in Opposition to Application for Stay.

sharpen existing competition (App. 310-311; 328-331). (See pp. 25-30 below.) The Commission further took account of the competition from motor carriers and water carriers (App. 253-254, 298, 318-319).[13] (Pp. 30-33 below.) And finally, the Commission gave appropriate weight to "the testimony of the many shippers, associations, and other groups" whose evidence supported the conclusion that the effect of the elimination of competition between Northern Pacific and Great Northern was not sufficient to outweigh the public benefits from the merger (App. 320). (Pp. 34-38 below.)

On the basis of this comprehensive and considered appraisal of the competitive consequences of the merger, subject to the conditions imposed, the Commission determined that "loss or reduction of competition between GN and NP in the northern tier does not require denial of the applications" (App. 320) and that there will be "overriding benefits to the public" (App. 344).

4. *Further Reconsideration.* On petitions for reconsideration, the Commission again reexamined the issues and issued a Second Report on Reconsideration, dated April 11, 1968 (331 I.C.C. 869; App. 463-495).[14] The fact that numerous railroads will be competing for the long haul transcontinental shipments between the Pacific Northwest and the Midwest gave rise to one of the principal issues in that reconsideration report (App. 480-491). Western Pacific (connecting with the Santa Fe to Chicago) and Union

[13] An example: a grain elevator operator at one of the common points, Laurel, Montana (1,023 miles from Seattle), formerly moved all of his shipments to West Coast terminals via the Northern Pacific but testified: "In 1958, 21 per cent of my outbound grain shipments were handled by truck; 1959, 27 per cent; 1960, 58 per cent; 1961, 83 per cent, and 100 per cent by truck to date this year" (Tr. 13690-91).

[14] The Justice Department did not file a petition but replied to petitions filed by other parties.

Pacific compete with Milwaukee, Northern Lines, Soo Line Canadian Pacific and other routes for that traffic (see map, appendix to this motion)." Fearing the increased competition from a strengthened Milwaukee on traffic to and from the Pacific Northwest after this merger, Western Pacific and Union Pacific sought to retain provisions in the merger order that would have restricted Milwaukee's rate-making and service competition via Milwaukee's routes against these central corridor routes (App. 484-486). Overruling the Western Pacific and Union Pacific arguments, the Commission intensified the competition by modifying the merger condition in accordance with Milwaukee's request (App. 490-491). The Commission also altered the terms of certain other conditions to be imposed and stated:

> "Satisfied that, by the imposition of appropriate conditions, the competitive ability of Milwaukee and North Western will be strengthened and that, by the attrition agreements, adverse effects on railway labor will be ameliorated, we remain convinced that these and other public interest factors of record were and are adequate to warrant our conclusion in the reconsideration report that the merger would now be consistent with the public interest." (App. 475-476)

5. *District Court Decision.* On May 9, 1968, the Department of Justice brought suit in the United States District Court for the District of Columbia to set aside the Com-

[15] Union Pacific alone handled from 26.9 to 29 percent (in different years) of all the east-west traffic to and from the Pacific Northwest that is shown in the table (App. 145-146) to which Justice Department refers (J.S. 9). The Department significantly fails to mention Union Pacific (which directly serves Portland, Tacoma, Seattle and Spokane) in describing competition for the Pacific Northwest traffic. The table itself is confined to Union Pacific, Milwaukee, Great Northern and Northern Pacific and does not show the amount of such traffic carried by Western Pacific Santa Fe, Soo Line Canadian Pacific and other routes.

mission's orders. Briefs having been filed, the court heard oral argument on July 9, 1968. On brief and in oral argument, the Justice Department attacked the Commission's orders on the grounds advanced in the Jurisdictional Statement and on other grounds that are not renewed here. On November 20, 1968, the District Court unanimously rejected the contentions of the Justice Department, sustained the Commission's orders and dismissed the complaint. The detailed opinion reviews both the Commission's findings and the evidence underlying those findings (App. 1-58). The District Court gave particular attention to the findings and evidence on competition and then stated:

> "We conclude the above consideration of the bearing of the problem of competition on the public interest equation of the merger by stating that the significant findings and conclusion of the Commission in this matter, to the effect that the competitive situation which will result from the merger is consistent with the public interest, are supported by substantial evidence considering the record as a whole, are reasonable and are sustained." (App. 37-38)

ARGUMENT

I. THIS APPEAL RAISES NO QUESTION THAT DESERVES PLENARY REVIEW BY THIS COURT.

This case raises no novel or important questions of law. As we shall show, the determination of the Commission has a reasonable basis in findings that are supported by substantial evidence. This Court's decisions establish that in a case of this kind once that showing is made judicial inquiry is at an end. *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88; *Penn Central Merger Cases*, 389 U.S. 486, 498-499. Contentions that the Commission in weighing the various factors comprised in the statutory standard gave too little weight to one factor as against another, and

attacks upon the wisdom of its decision on the balance of advantage to the public interest, raise no questions that deserve review by this Court.

Although the Department of Justice asserts that the Commission in approving the merger erred "as a matter of law" (J.S. 19, 22), in fact the Department is simply quarreling with the Commission's appraisal of the evidence, the inferences and conclusions that the Commission drew therefrom and the wisdom of the judgment that the Commission made in weighing the transportation benefits of the merger against its effects on competition.

The real nature of the Department's argument is betrayed in a passage at page 19 of the Jurisdictional Statement in which the Department's own appraisal of the facts and inferences, colored by its own conceptions of the public interest, masquerades as a rule of law. In that passage the Department asserts that under the statutory standards "conventional benefits" of a merger are, "as a matter of law," not enough to establish that a merger is in the public interest if "substantial intramodal competition is eliminated," "the remaining intermodal and intramodal competition is weak," and the area involved "is heavily dependent on rail service." And the Department then concludes: "Greater needs and advantages to the public interest are required, but this record does not show them."

There is implicit in each step of the Department's first assertion a judgment on facts. Each of the words "conventional" (with its overtone of inconsequence or unimportance), "substantial" and "weak," for example, embodies such a judgment. And the Department's concluding assertion simply means that in its opinion if the facts are properly appraised and the benefits of the merger weighed against its limitation of competition the benefits are not sufficiently

important and desirable to justify the adverse effects on competition.

In the instant case the Commission reached a different conclusion. It considered the evidence and found, among other things, that the adverse effects on competition are not as severe as the Department contends and that the benefits that the merger will bring to the carriers, to shippers, to employees and to the public at large, including the benefits of enhanced rail competition [illegible] by the Commission's conditions, are substantial and [illegible]mically significant. On its evaluation of all of the evidence the Commission, as it is authorized to do by Congress, weighed the adverse effects of the merger on competition against its transportation benefits and decided in the exercise of its judgment that on balance the merger would serve the public interest.

In the case of any significant merger in the transportation industry it is a difficult and complex task to appraise the facts and to reach an ultimate conclusion on where the balance of advantage to the public interest lies. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87. The very nature of the task, involving as it does both the evaluation of complicated facts and finally the exercise of discretionary judgment, makes inadmissible the suggestion that there is a rule of law of general application that automatically assigns different values to different considerations and dictates that one conclusion must be preferred to another.

The applicable rule of law does not distribute values among the several factors that the Commission is authorized to consider or prescribe the ultimate conclusion that the Commission must reach. Instead the rule is that the determination of the Commission, which is the agency authorized by Congress to weigh competing considerations and to make an ultimate judgment in the public interest,

should be sustained if it has a reasonable basis in findings that are supported by substantial evidence. The argument of the Department disregards the teaching of the decisions of this Court for 25 years beginning with *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944). Extensive citation is unnecessary; it is enough to refer to this Court's most recent opinion under Section 5(2) of the Interstate Commerce Act, *Penn-Central Merger Cases*, 389 U.S. 486, 498-499:

> "With respect to the merits of the merger, however, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence. See, *e.g.*, *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57, 69 (1966)."[16]

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[16] The Department's attempt (J.S. 18-19) to distinguish the *Penn-Central* merger case, 389 U.S. 486, and the *Seaboard-Atlantic Coast Line* merger case, 259 F. Supp. 993 (M.D. Fla.), affirmed *per curiam* 386 U.S. 544, does not touch the significance of those cases. The District Court properly relied upon the statements in those cases defining the statutory standards and the scope of judicial review. The Commission, approving the merger in its Second Report, did not rely upon the *Penn-Central* case because it had not been decided at the time of the Commission's Second Report. The Commission cited the *Seaboard-Atlantic Coast Line* case as indisputably establishing that a transaction may be consistent with the public interest even though it eliminates substantial competition (App. 315); in that case the merger "creates a monopoly" in "central and western Florida." (259 F. Supp. at 1005) On any view of those cases they show that a merger is not necessarily inconsistent with the public interest merely because it eliminates substantial competition and because the carriers involved are not financially weak.

II. THE COMMISSION'S FINDINGS AND CONCLUSIONS WITH RESPECT TO COMPETITION ARE SUPPORTED BY DETAILED FINDINGS AND SUBSTANTIAL EVIDENCE.

A. Rail Competition. The Commission gave full and proper consideration to the fact that competition between the merging roads will be eliminated and also to the fact that, through conditions imposed, new rail competition will be created and other rail competition will be strengthened.

As shown by the Commission's Second Report and the District Court's opinion, the extent of existing competition between Great Northern and Northern Pacific is much less than the Jurisdictional Statement asserts (App. 22-25, 316-319).

Great Northern and Northern Pacific in large part serve different territories. The greater part of Great Northern's mileage is in the eastern portion of the system while the greater part of Northern Pacific's mileage is in its western portion (App. 11, 253). In Minnesota, the southern part of the state is served by Great Northern and other railroads but not by Northern Pacific (App. 253). "West of Minnesota, GN serves primarily those communities lying to the north while NP serves the southern parts of these States" (App. 253). "In Montana and North Dakota, for example, the lines are generally widely separated, as much as a hundred miles apart. Obviously a shipper located on or near the lines of one road, but 50 or 100 miles from the line of another, is not influenced by competition in the selection of carriers." (App. 316) Of the two roads, only Great Northern serves Iowa and South Dakota and only Great Northern reaches California (App. 253).

Because of the wide geographical spread between most of the lines of Great Northern and Northern Pacific (see

map, appendix to this motion). "The number of stations at which rail competition would be eliminated entirely is small, and these stations [called Class I] do not produce any great volume of applicants' business" (App. 317).[17] The only traffic that will become noncompetitive between railroads by reason of this merger produces less than 6.1 percent of the merging lines' revenues in the four-state Northern Tier and less than 4.5 percent of the systemwide revenues (App. 316, Cols. A and B).[18] Only four of these communities have a population over 15,000 and none over 35,000 (Exam. Rep. 191).

The great bulk of the merging railroads' stations are served by only one of those roads, with or without other railroads. Those stations (called Class III and IV stations) "would not be directly affected by the merger" and at those stations "there would be no direct competitive impact, no lessening of competition" (App. 317). The Commission found that in the Northern Tier states 88 percent of applicants' stations are in this category (92 percent systemwide). They account for 67 percent of applicants' tons and 56 percent of their revenues in the Northern Tier (79 percent and 69 percent, respectively, systemwide). (App. 317)

The rest of the stations (Class II) are the ones to which the Commission and the District Court gave par-

[17] These are stations served by both Great Northern and Northern Pacific and by no other rail carrier.

[18] These small percentages *overstate* the amount of traffic that will be rendered noncompetitive between railroads. They include traffic at Billings, Montana (pop. 52,851) whereas, under the conditions finally imposed, Milwaukee will obtain access to Billings and compete there against the merged company (App. 329, fn. 19, item 4; 307, 331). Moreover, the Second Report, for the reasons stated therein, found that some of the competition at Class I stations mentioned above "is more theoretical than real" (App. 317).

ticular attention. These stations (7.5 percent of applicants' stations in the Northern Tier) include the major commercial centers and gateways of Head of the Lakes (Duluth and Superior), Portland, Seattle, Spokane, and Twin Cities (St. Paul and Minneapolis) (App. 316, 318). They are common points for Great Northern and Northern Pacific and also for other rail competitors. Rail competition will continue at the Class II stations although the Commission found and took into consideration the fact that it will be "diminished" when the merged company replaces Great Northern and Northern Pacific (App. 316).

The Department of Justice, in its percentage tally, erroneously treats all traffic handled by Great Northern and Northern Pacific at the Class II points as if it were competitive between them. That total traffic produced 37.7 percent of the two roads' revenues in the Northern Tier, or 26.9 percent systemwide; the tons were 28 percent in the Northern Tier and 18 percent systemwide (App. 316). For the various reasons pointed out by the Commission in the Second Report and described by the District Court, however, a large part of the total traffic handled by the two roads at the Class II stations is not now competitive between them (App. 24-25, 316-321). As the District Court stated after examining the findings and the evidence, "The factors considered by the Commission are broadly indicative of the weakness of the Department of Justice's emphasis on raw statistics . . . [M]uch of the revenue attributed to Class II stations is not subject to competition between the applicants" (App. 24, 25). The court gave examples of the "raw" character of the statistics used by the Department (App. 24-25). For instance, the shipments at Twin Cities that terminated or originated at one of the great many stations that are served by either Great Northern or Northern Pacific (but not both) are non-competitive between them but are included in the figures for Class II traffic. The Department does not dispute that evidence or

the findings in the Second Report on which the court based its comments (App. 316-319).

The Department's assertion that "Competition will undisputably be eliminated as to a substantial majority of the traffic carried by the two leading rail competitors in this vast transcontinental area" (J.S. 17) is incorrect and is not supported by the findings of the Commission or the evidence. The assertion apparently rests on several incorrect assumptions. One is that the two lines are competitors for all of the traffic handled by them at the Class I and Class II stations. On the basis of substantial evidence, as shown above, the Commission found to the contrary (App. 316-319) and the District Court sustained those findings (App. 34-36). The Department also assumes that these carriers are competitive for all of the overhead traffic, which accounts for 13 percent of their revenues (App. 145). There is no support for this assumption in the findings of the Commission or in the evidence.

In addition, the Department's assertion ignores the fact that vigorous competition between railroads exists at the Class II stations and will continue there.[18] Contrary to the Department's view that the Northern Lines' "only rail competition" comes from the Milwaukee (J.S. 18), a shipper in the East, South or Midwest, or in the Twin Cities or Head of the Lakes areas, routing transcontinental shipments to the Pacific Northwest, has and will continue to

[18] For example, Seattle and Portland will each be served after the merger by Union Pacific, Milwaukee and the merged company. Portland is also served by a fourth railroad, Southern Pacific. The principal interior common point, Spokane, Washington, will be served by Union Pacific, Milwaukee and the merged company. The railroads serving both Head of the Lakes and Twin Cities include Milwaukee, Soo Line, North Western and the merged company.

have the choice of several competing rail routes and, of course, the same choice applies east bound.

A glance at the map attached to this motion will indicate the extensive rail competition. Union Pacific, with its direct routes between Seattle, Portland, Spokane, Tacoma, Butte and other points in the Pacific Northwest, and Council Bluffs, Iowa, with connections to Chicago, will continue its competition. Union Pacific (ignored in the Jurisdictional Statement) has regularly obtained almost as much of the east-west traffic to and from the Pacific Northwest as has either Great Northern or Northern Pacific (App. 145-146; cited by the Department at pages 9-10).[20] Transcontinental traffic from or to Pacific Northwest points such as Portland, Seattle, and Spokane flows through the Twin Cities only to the extent that the Northern Lines, Milwaukee and Soo Line can persuade shippers to route via Twin Cities rather than via the central corridor routes of Union Pacific, Western Pacific-Santa Fe or Southern Pacific or via the southern transcontinental routes.[21] Soo Line from Chicago closely parallels Great Northern from the Twin Cities through Minnesota to the northwest part of North Dakota and there connects with the line of its parent (Cana-

[20] Union Pacific's competitive interest is indicated by its strong opposition to the Milwaukee condition under which Milwaukee will gain entry into Portland and will divert traffic from Union Pacific (App. 368, 469).

[21] The percentages of eastbound and westbound traffic set out at pages 9 and 24 of the Jurisdictional Statement evidently have been calculated by excluding all traffic of Union Pacific and other roads whose competitive transcontinental routes do not go through Twin Cities, and by excluding the Soo Line-Canadian Pacific route that does go through Twin Cities.

dian Pacific) to compete for the long haul on the transcontinental traffic to and from Spokane and the rest of the Pacific Northwest via the connection with the Union Pacific system at the international border. The Western Pacific-Santa Fe route between Chicago and the Bieber connection in northern California competes for the long haul on Pacific Northwest traffic (App. 480-481). Southern Pacific, which directly reaches Portland, competes via its Ogden, Utah, route (with connections east of Ogden) and via its southern route for the traffic between the Pacific Northwest and the eastern and southern parts of the country. And the merged company will be competing against a competitively strengthened North Western for transcontinental shipments via Twin Cities which North Western, under one of the gateway conditions to the merger, will be able to divert from the merged company in North Dakota (App. 100-101, 329-331). North Western, as well as Milwaukee, Soo Line and other roads, competes with the Northern Lines at Head-of-the-Lakes and at the Twin Cities, and its lines extend to Chicago, North Dakota, Nebraska and other areas.

Moreover, Milwaukee, with its competitive ability increased by the Commission's conditions described below, "will be substantially strengthened as a meaningful transcontinental competitor" (App. 319). Milwaukee will be competing for traffic at every major point served by the Northern Lines; "it will have a broader base upon which to solicit additional traffic, and to enter into heretofore inaccessible markets" (App. 322-323). And this will include establishment of a Southern Pacific-Milwaukee north-south route for California-Washington traffic in competition with the Northern Lines-Western Pacific route and the Union Pacific route.

B. Conditions Imposed for Milwaukee and Other Railroads. The appellant's appraisal of the Milwaukee conditions as being "at best a relatively limited offset against the anticompetitive impact of the merger" (J.S. 26) is at odds with the well-supported findings of the Commission. Those findings are reviewed in considerable detail in the District Court's opinion (App. 26-31). The court concluded, in part, that:

> "The evidence gives substantial support to the conclusion of enhanced competition by Milwaukee . . . Milwaukee, by no means a negligible competitor previously, will become for the first time a much strengthened competitor, realistically vying for long haul traffic at every major point served by Northern Lines." (App. 31)

The existing limitations on competition by Milwaukee, which will be removed by this transaction, were described at length by the Commission (App. 108-113). To illustrate:

> "Since Milwaukee's lines do not reach Portland or Bieber, the Milwaukee has no direct connection with Southern Pacific or with Western Pacific. Since applicants and Union Pacific do not participate in through routes and joint rates with each other or with Milwaukee at junctions which provide them with less than a maximum haul, Milwaukee cannot participate in alternate transcontinental through routes via junctions west of Twin Cities and the Missouri River gateways to and from all major west coast terminals. Nor can it participate in north-and-south traffic between major west coast cities." (App. 108-109)

> "The limitations on Milwaukee's routes west of Twin Cities and Sioux City, together with the fact that Milwaukee is short hauled at the Twin Cities gateway on a large volume of traffic, has severely limited Milwaukee's traffic potential, and has impaired its competitive position in relation to applicant railroads." (App. 111-112)

"Another factor which discourages the movement of traffic over Milwaukee's lines and the location of industry on its lines is the dual basis of switch charges." (App. 112)

Moreover, Milwaukee at present cannot serve Billings, which has grown to be one of the two largest cities in Montana. (Milwaukee does and will continue to serve Great Falls, the other city.)

The Milwaukee conditions, requested by it and imposed by the Commission, are "designed to remedy its handicaps" (App. 29). As the summary below shows, they will remove these historic and severe limitations on the scope and extent of competition (App. 310-311, 328-334).[22]

Eleven New Gateways to be Opened for Milwaukee. Vast quantities of traffic along the lines of Great Northern and Northern Pacific, to or from the East, South and Midwest, are entirely without rail competition for the long haul in the Northern Tier states. This is because the shipments originate or terminate at one of the multitude of points served by only one of those roads and not by another railroad, and because the shipper has been unable to route the traffic for interchange with the Milwaukee except at Twin Cities or Sioux City, Iowa. The interior gateways in the Northern Tier are closed, in order to protect the individual railroad's long haul. For example, on a shipment from Othello, Washington (served exclusively by Northern Pacific), destined to Chicago there is now no rail competition until the shipment reaches the gateway at the Twin Cities. Under the condition imposed, competition for the

[22] In the First Report the majority of the Commission, in disapproving the proposed transactions, nevertheless recognized that conditions less extensive and effective than those imposed by the Commission in its Second Report "would make the Milwaukee a stronger carrier after merger than it is today." (App. 119)

long haul to Twin Cities will be created; the shipper from Gleed can route Northern Pacific for the short haul to Spokane and then order Northern Pacific to give the shipment to the Milwaukee for the long haul (Tr. 8630).

The map attached to this motion shows the eleven new gateways that will be opened for the Milwaukee on the lines of the merged company in the Northern Tier, and the territory tributary to each gateway. As a consequence of this condition the Milwaukee will no longer be confined to the handling of traffic for the long haul only on shipments that originate or terminate on its own lines in the Northern Tier, but will compete for the long haul on traffic originating or terminating on the lines of the merged company in the colored large tributary areas for the respective new gateways, in lieu of delivering or receiving the shipments only at Twin Cities and Sioux City. Wholly new rail competition of large scope will be created.

Milwaukee Entry to Serve Portland and Gain Connection with Southern Pacific for North-South Traffic. Milwaukee's line now stops short of Portland at Longview Junction, 47 miles north of Portland. Under the imposed conditions, however, it will obtain access to Portland, adding to competition both by that entry and by becoming a transcontinental rate making line (App. 311), *i.e.*, a line able to establish competitive rates without concurrence of connecting competitive lines.[23] By connecting with Southern Pacific at Portland, Milwaukee also will be able to compete with the merged company and with Union Pacific for the north-south traffic along the Pacific Coast.

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[23] Milwaukee now cannot make competitive rates to or from Portland or California without concurrence of its connections, Union Pacific and the Northern Lines, and these roads are competing with Milwaukee for the traffic.

Milwaukee Trackage Rights for 102 Miles in Washington to Enable it to Institute Fast North-South Service. By obtaining the trackage rights that it desires from the merged company between certain Washington points, Milwaukee will be able to offer single line service all the way through Washington from the Canadian connection at Sumas down to Portland. This condition, among other things, "will allow the Milwaukee to provide rail competition on traffic to and from Canada" (App. 311, 331).

Extension of Milwaukee Service to Billings, Montana. This condition will enable Milwaukee to compete for Billings traffic as an independent rate-making line, able to establish competitive rates without concurrence of other competing roads.

Elimination of Dual Basis of Switching Charges that Discourages Movement of Traffic Over Milwaukee. The dual basis of switching charges, described in detail at pages 289-291 of the Examiner's Report, "discourages the movement of traffic over Milwaukee's lines and the location of industry on its lines" (App. 112). The condition requiring elimination of the dual basis will increase competition from the Milwaukee.

The effect of these and other Milwaukee conditions clearly "would be to strengthen the Milwaukee both as to revenue potential and competitive posture" (App. 331). And the strengthening, contrary to the Department's arguments, will be substantial both as to the "competitive posture," described above, and in revenue potential. The Commission estimated Milwaukee will divert $20 million of annual revenues from the merged company ($11.6 million under three conditions and $8.3 million under another) (App. 129; see also Ex. 244, pp. 27-28). It also estimated that the diversion of revenues from Milwaukee to the merged company on other competitive traffic will be $5.1 million (App. 129;

Ex. 244, p. 25) leaving Milwaukee with an overall revenue gain of about $15 million. Even if a 20 percent reduction were made, as computed by the appellant (J.S. 25, fn. 13),[24] Milwaukee will be gaining about $12 million. The Department of Justice fails to note that railroad operations are characterized by relatively high and constant fixed costs and that the $12 or $15 million would be incremental traffic, a substantial proportion of which will flow through to Milwaukee's net income. This increase in net income will be significant. Milwaukee's net income was $1.3 million, $5.3 million and $7.3 million in 1960, 1964 and 1965, respectively (App. 105). Moreover, Milwaukee will further gain by diverting certain Portland traffic from Union Pacific (App. 333).

Rail competition also will be increased by several conditions imposed for the North Western, including the opening of gateways between the merged company and that road at Oakes, North Dakota, and Crawford, Nebraska, to permit North Western to initiate competition against the merged company for longer hauls on the transcontinental and other traffic (App. 100-101, 329-330). Opening of a new gateway with Southern Pacific at Klamath Falls, Oregon, together with other changes required in the imposed conditions "should aid the establishment of genuine rail competition on the Pacific Coast, to the great benefit of the shipping and consuming public" (App. 332-333). Other conditions will make it possible for the Soo Line to initiate competition against the merged company for certain traffic in Minnesota

[24] The actual 20 percent reduction for "contingencies" which may or may not occur (Ex. 244, p. 32) did not apply to the revenues; it applied to the merged company's net loss of revenues less the expenses the company would no longer have after the traffic was diverted to Milwaukee (App. 259-261). Moreover, what the Department refers to as Milwaukee's "net" railway operating revenues (J.S. 25-26) are not "net" (App. 105).

to which Soo Line does not now have access (App. 446-447). The Examiner found that as a result of the Soo Line conditions "Competition would be intensified" (Exam. Rep. 235).

The Commission was on sound ground when it stated:

> "We believe that the overall effect of the conditions imposed here will portend for a strong degree of intramodal rail competition in the affected territory, promote the effective development of improved transportation services to the shipping and receiving public, and comport generally with the purposes and objectives of the national transportation policy as declared in the act." (App. 334)

C. Intermodal Competition. In its evaluation of the extent of competition after the merger, the Commission properly gave weight to the extensive and increasing highway and waterway competition in the Northern Tier and elsewhere in applicants' territory (App. 253-255, 298-299, 310, 318-319, 344). The District Court, under the title "Competition—Intermodal," reviewed the findings, the evidence and the contentions of the Department of Justice (App. 34-38). Finding those contentions to be without merit, the court referred to examples of testimony and stated:

> "There is ample evidence in the record that motor carriers are reasonable substitutes for railroads in many instances . . . The manner in which trucks have managed to undercut the railroads in one or another facet of almost every submarket illustrates the fungibility of rail and motor transport. The rapid growth of the trucking industry and incursion of motor transportation into railroad traffic of all types provides a substantial basis for the Commission's conclusion that motor carriers are ready substitutes for, and vigorous competitors with, rail transport in the Northern Tier." (App. 35, 36)

The Examiner found that "There are 248 Class I motor carriers that serve points on the lines of applicant railroads" (Exam. Rep. 196). Describing the common carrier truck lines serving points in the Northern Tier, he referred specially to one "large coast-to-coast motor carrier, the operations of which blanket the area served by applicant railroads." He found that the 248 motor common carriers "provide competition with applicants and other [railroads] to an extent undreamed of in earlier days." "From 1947 to the latest year available for each line, their operating revenues increased by $1,489,214,000 or 329.64 percent and their ton miles increased by 23,085,155,000 ton miles or 246.57 percent" (Exam. Rep. 196). Moreover, the Examiner found that the total traffic of private and exempt motor carriers is almost double that of motor common carriers and "has been growing more rapidly than has the traffic of the certificated motor carriers" (Exam. Rep. 197). He stated:

> "Competition from the private and exempt highway carriers is a strong force in the territory served by applicant railroads. For example, the range of truck competition on grains into the Twin Cities and the Head-of-the-Lakes now extends to 400-mile hauls, and where loads of grain are used for back-hauls, there is no limit as to the length of haul." (Exam. Rep. 197)

The Department refers to "long-haul bulk cargo transportation" and to applicants' "characteristically long hauls and high proportion of bulk cargo," (references which it derives from certain passages in the First Report) and seeks to create the impression that intermodal competition is minimal or inconsequential in the areas where applicants operate (J.S. 9, 23). Regarding what the Department calls applicants' "characteristically long hauls," supposedly as protecting applicants against truck competition, the District Court said: "Nor is the long haul the sanctuary of the

railroad. The average length of haul of Class I motor carriers operating in the merger territory in 1959 was 402 miles, as compared with 381 miles for Great Northern and 462 miles for Northern Pacific." (App. 35-36) Regarding the Department's mention of bulk cargo, the court, citing the transcript, stated that "Numerous witnesses, principally shippers, described substantial incursions by motor carriers into railroad traffic in . . . cement, fruit, grain, *et cetera.*" (App. 35)

In its First Report the Commission stated: "Of course, the rapid growth of highway, barge, and pipeline carriers has affected the traffic and revenues of the applicants. Through unification, applicants hope to recapture a large volume of traffic that has been lost to other modes of transportation, including private and exempt for-hire carriers. The rapid growth of motor, water, and pipeline carriers, and the intensification of intermodal competition are matters of common knowledge." (App. 135)

In the Second Report the Commission found that "Applicants are faced with growing intermodal competition" and "are losing a steadily increasing share of the transportation market going to competitors. Construction of new superhighways and pipelines and improvements in waterways presage a competitive future even more intense than the present." (App. 298) The Commission then reviewed the severe downtrend in applicants' earnings over the period of the increase in intermodal competition (see pp. 9-10 above).

The Commission pointed out that it is in the interest of the producers in the Northwest (who firmly support the merger) for the applicants to be able to compete more effectively with the intermodal competitors:

> "Because of the nature of the products and the distances involved, rail transportation to centers of popu-

lation *at costs low enough to permit participation in these markets* is of primary importance.[25] There is an imbalance of traffic . . . The lower-rated traffic in its long haul east is not as vulnerable to incursions by intermodal competitors of the Northern Lines as the higher-rated manufactured articles moving into the area served by these lines for consumption. The latter, both from the East and from the west coast, are vulnerable to motor carrier competitors and others, and it is this traffic which the rail carriers must retain to balance their operations." (App. 253-254)

III. THE COMMISSION'S FINDINGS AND CONCLUSIONS WITH RESPECT TO BENEFITS ARE SUPPORTED BY DETAILED FINDINGS AND SUBSTANTIAL EVIDENCE.

The Justice Department, contrary to the evidence and findings, contends that the transportation need for the merger is not "serious" and that the public benefits are not "important." Although the Department admits that the merger would produce "savings" and "operational efficiencies" (J.S. 17) and does not dispute the Commission's finding that the transaction would result in "a more proficient transport agency" (J.S. 13), the Department dismisses these benefits as being "conventional" (J.S. 17). These benefits, however, are precisely the kind of benefits whose importance is recognized in the declaration of National Transportation Policy of Congress "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . ." (49 U.S.C. preceding Section 1), and in the decisions of this Court. See particularly *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88.

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[25] Quoting from this sentence, the Department of Justice omits the significant words italicized above (J.S. 7).

The Department's use of the characterization "conventional" to denigrate the benefits is merely one aspect of its basic argument that the Commission, in determining whether the merger would be consistent with the public interest, gave too much weight to transportation benefits and too little weight to adverse consequences to competition. As this Court has said, the determination of the relative weight that should be given to competing elements encompassed in the National Transportation Policy "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry," and one that Congress has committed to the judgment of the Interstate Commerce Commission. *McLean Trucking Co.* v. *United States, supra* at 87. The Department's attack on the merits of the Commission's judgment that the benefits in this case are important ignores these considerations and is an unabashed invitation to reassess the voluminous evidence and to substitute the Department's notions of the public interest for the judgment of the Commission. Even if this were permissible, which it is not, a review of the evidence relating to the benefits and the Commission's findings on that evidence shows that the Department's attack is without merit, and raises no question that deserves review by this Court.

Since hearings in this case were held at sixteen points throughout the system, where hundreds of shippers testified to their own situations and needs, the Commission was thoroughly informed of the nature and importance to the public of the transportation changes that will result from this merger. With that background of a very extensive record, the Commission found that the benefits would be "overriding" in importance and made detailed supporting findings in which, as the District Court stated, "The benefits of merger to applicants, to shippers and to the general public, were enumerated" (App. 15, 305-311).

The Commission found that "consolidation of facilities, elimination of wasteful duplication, improved routing, better car fleet utilization, and avoidance of time-consuming interchanges among applicants will result in a more efficient railroad" (App. 302). "The shipper benefits resulting from these factors are spread throughout the whole spectrum, resulting in faster transit and quicker delivery times, less damage and fewer claims, easier tracing, and overall, a more expedited and satisfactory service" (App. 309). The benefits include "improved car supply, wider routing with more liberal transit privileges, partial loading and unloading privileges, and reconsignment and diversion privileges" together with the fact that "applicants' ability to operate more efficiently and at lower cost should be reflected in the service and rates afforded shippers and receivers" (App. 305). The Commission cited a number of examples. Thus, because of the use of the shortest or most efficient routes and use of new consolidated facilities to be constructed at common points, the high-volume heavy-power service from Seattle to Chicago would be 12 hours faster after merger and "Great Northern traffic from Spokane and west thereof through Laurel [Montana] would be advanced 24 hours in moving via Northern Pacific's short line" (App. 306).

Finding that the merger would also benefit "the general public" the Commission noted that elimination of duplicate facilities at certain common points will aid those communities in various specified ways; that "The public will also benefit from the increased ability of the applicants to meet the increased intermodal competition by providing improved lower-cost service"; and the merged company will have "an increased capacity to serve the national defense" (App. 310, 311).

The shippers and areas served by other railroads, particularly Milwaukee and North Western, will benefit by the conditions imposed as a part of the approved transaction

(App. 310-311, 331). Moreover, "The opening by applicants of 11 interior gateways to the Milwaukee will give many shippers a realistic choice of railroads for the first time in history" and will result in "the opening of new markets, transit points, and sources of supply for shippers and receivers located on applicants' lines who cannot now reach points on the Milwaukee not served by applicants, and those located on the Milwaukee to whom applicants' lines are now closed" (App. 311). And inclusion of the Burlington in the merged system with its parent companies was approved not only because it was necessary so that the system could achieve the results for which it is being created "but also in order that the many shippers and receivers served by the Burlington may participate in the public benefits flowing from the unification" (App. 338).

Through the imposed conditions, the employees will be benefitted by agreements under which "employees would receive guarantees and job assurances for the rest of their working lives" (App. 326). The Commission found that "the protection thereby afforded, providing as it does job security as well as monetary benefits, could hardly have been achieved except for the merger" (App. 326; see pp. 11-12 above).

The large amount of annual savings to be produced by this merger ($40 million) is a matter of public importance, especially in view of the severe downtrend in applicants' pretax earnings from railroad operations over the period 1951-1965 and their abnormally low rate of return. (See pp. 9-10 above.) Those savings, even if they had been made in each of the years 1961-1965, still would have left applicants' earnings for that period below the levels of 1951-1955. Increased earnings have a direct beneficial effect on the levels of rates for rail service and encourage investment in new

and improved rail facilities and equipment to meet the transportation needs of the public (App. 299, 304-305).

In determining that the merger benefits are of overriding importance, the Commission has the full support of the shipping public. The Commission noted in its First Report that "most shipper and related transportation interests in the territory involved support the applicants' case . . ." (App. 86). It stated that "307 witnesses (237 shippers and receivers of freight, 39 representatives of shipper associations, and representatives of various business and civic organizations) testified in support of the proposed unification. Of the total number of shipper and other public witnesses, the great majority supported the proposal" (App. 85). After the applicants announced willingness to accept the Milwaukee and North Western conditions, no shipper or related transportation interests opposed the proposal. The United States Department of Agriculture, which participated in the proceeding both as representative of the nation's farmers and as the largest single shipper of agricultural commodities, notified the Commission of the Department's belief that the merger, subject to certain conditions that were included in the order, will benefit the agricultural community and the public.

Most state governments or state regulatory agencies that participated also expressed their approval of the proposed merger (App. 268). The States of Nebraska and Missouri intervened and urged approval from the outset and the Governor of Nebraska, speaking for the state and its railway Commission, appeared as a witness (Tr. 4673). The North Dakota Public Service Commission, in its reply to applicants' petition, described the benefits of the merger to the North Dakota public and stated that "we support Applicants' petition for reconsideration and respectfully

urge that it be granted in all respects." The South Dakota Public Utilities Commission took the same position. The Governor of Iowa testified to the merger benefits to Iowa shippers and producers (Tr. 4213) and the Iowa State Commerce Commission informed the Commission that in view of applicants' acceptance of the Milwaukee and North Western conditions it "does not oppose the Applicants' petition for reconsideration." The Public Utility Commissioner of the State of Oregon, formerly in opposition, changed to a position of strong support. The Public Service Commission of Wyoming petitioned in October, 1966, "for leave to intervene in support of Applicants," describing the benefits to Wyoming shippers. Michigan and Wisconsin had "no objection to approval of a suitably-conditioned unification" (App. 268). The Province of British Columbia, served directly by Great Northern to Vancouver and by Milwaukee and Northern Pacific through connections at the border, also supported the merger proposal with the Milwaukee conditions, including particularly the conditions by which Milwaukee will obtain trackage rights to institute a fast competitive north-south service between the Canadian border and Portland, Oregon (App. 268, 311, 329, fn. 19).

The District Court, after review of the record, held: "We conclude, also, that . . . contentions against the merger do not override the benefits, including savings and better service, which are projected in the reasoned judgment of the agency charged with primary governmental responsibility." (App. 6) This holding was justified by the Commission's findings and the evidence that supports them. That evidence shows that the merger will have substantial benefits in all facets of rail service—speed of service, better car supply, better routing, increased shipper privileges of various kinds, opening of markets and sources of supply,

large reductions in cost and the creation of rail competition in large areas where it now does not exist. In short, this merger, as conditioned, "will serve the national interest" and promote "the congressional objective of a rail system serving the public more effectively and efficiently." *Penn-Central Merger Cases,* 389 U.S. 486, 500.

CONCLUSION

For the foregoing reasons, the motion to affirm should be granted.

Respectfully submitted,

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